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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

UNITED STATES OF AMERICA,)
)
Plaintiff,)
)
WALKER RIVER PAIUTE TRIBE,)
)
Plaintiff-Intervenor,)
)
vs.)
)
WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et al.,)
)
Defendants,)
)
MINERAL COUNTY,)
)
Plaintiff-Intervenor,)
)
vs.)
)
WALKER RIVER IRRIGATION DISTRICT,)
a corporation, et. al.,)
)
Defendants.

IN EQUITY NO. C-125-RCJ
Subproceedings: C-125-B & C-125-C
CASE NO: 3:73-CV-00127

**MOTION TO DISMISS
CONCERNING THRESHOLD
JURISDICTIONAL ISSUES**

Nevada Department of Wildlife (NDOW) by and through counsel, Attorney General
CATHERINE CORTEZ MASTO, and Senior Deputy Attorney General BRYAN L. STOCKTON,
hereby submits their Motion to Dismiss Concerning Threshold Jurisdictional Issues.

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Respectfully submitted this 31st day of March, 2014.

CATHERINE CORTEZ MASTO
Attorney General

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MOTION TO DISMISS CONCERNING THRESHOLD JURISDICTIONAL ISSUES

I. INTRODUCTION

Pursuant to the instructions of the Court, the Nevada Department of Wildlife (NDOW) hereby submits its Motion to Dismiss Concerning Threshold Jurisdictional Issues. The Motion includes issues listed by the Court that are appropriate for a Motion to Dismiss at this time. Dkt. 1960, 1961. Specifically excluded from the motion, at the direction of the Court, are issues concerning matters that may be subject to the doctrine of *res judicata* and collateral estoppel as laid out in the case of *Nevada v. United States*, 463 U.S. 110 (1983); which will be the subject of a motion at a later stage in the case.

NDOW moves the court to dismiss claims for injunctive relief against groundwater use in the basins outside the reservation as they are not properly connected with the claims made herein and they are subject to proof well beyond the scope of what is required to prove the claims in the counterclaims filed by the United States and the Walker River Paiute Tribe.

II. ISSUES

1. Does the Decree Court have jurisdiction over groundwater in the subject basins by reason of the federally decreed water rights?

2. Are issues concerning groundwater rights properly part of this litigation to establish additional surface water rights by the United States and the Tribe?

III. FACTS

The Decree herein was entered in 1936. The United States appealed therefrom and the the appellate court ordered a

decree adjudging the United States to be entitled to the continuous flow of 26.25 cubic feet of water per second, to be diverted from Walker River upon or above Walker River Indian Reservation during the irrigation season of one hundred and eighty days for the irrigation of two thousand one hundred acres of land on the reservation, and the flow of water reasonably necessary for domestic and stock watering purposes and for power purposes to the extent now used by the Government, during the non-irrigating season, with a priority of November 29, 1859, and enjoining the

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defendants from preventing or interfering with the natural flow of the described quantities of water in the channels of the stream and its tributaries to and upon the reservation.

United States v. Walker River Irr. Dist., 104 F.2d 334, 340 (9th Cir. 1939).

The original Counterclaims were filed by the United States and the Walker River Paiute Tribe 1992. Dkt. 1 and 3. The Amended Counterclaims which form the basis for the current action were filed in 1997. Dkt. 58 and 59. Both Counterclaims seek additional surface and groundwater rights for federal purposes in excess of those awarded by the Decree. *Id.*

The United States' Amended Counterclaim also seeks rights to surface and underground water under federal law for the Yerington Paiute Reservation, Bridgeport Indian Colony, the Garrison and Cluette Allotments, Individual Allotments, the Hawthorne Ammunition Plant, the Toiyabe National Forest, the Mountain Warfare Training Center and the United States Bureau of Land Management. Dkt. 59.

The Nevada Department of Wildlife holds groundwater rights in Mason Valley Hydrographic Basin. There are no allegations that ground water pumping outside the boundaries of the Walker River Indian Reservation is interfering with rights held by the United States or with additional federal rights sought herein. There are likewise no allegations in the Amended Counterclaims that ground water pumping outside the boundaries of any other federal reservation is interfering with any of the water rights the United States claims for those reservations based upon federal law.

IV. STANDARD OF REVIEW

FRCP Rule 12 (b)(1) concerns motions to dismiss for lack of subject matter jurisdiction. The standard of review for these motions presumes that the Court does not have jurisdiction. "Federal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute, which is not to be expanded by judicial decree. It is to be presumed that a cause lies outside this limited jurisdiction, and the burden of establishing the contrary rests upon the party asserting jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675 (1994) (Internal citations omitted). Thus, the United States and the Tribe bear the heavy burden to overcome the presumption that this court does

1 not have jurisdiction over groundwater users outside the boundaries of the federal
2 reservations.

3 This motion is partially based on Federal Rule of Civil Procedure (FRCP) Rule 12 (h)(3)
4 which states that: "If the court determines at any time that it lacks subject-matter jurisdiction,
5 the court must dismiss the action." Although this Court would have limited jurisdiction to
6 determine whether groundwater pumping impairs decreed rights, the Court should
7 not exercise its supplemental jurisdiction if the subject matter under consideration is not within
8 the "the same case or controversy under Article III of the United States Constitution."
9 28 U.S.C. § 1367 (a).

10 **V. ARGUMENT**

11 The District Court does not have Jurisdiction to Administer Groundwater Rights under
12 Nevada Law.

13 **A. Introduction**

14 The United States and the Tribe requested injunctive relief against both surface and
15 groundwater users who are "asserting any rights, title or other interest in or to such water
16 rights." Dkt. 58 at 18. However, current precedent gives a federal court jurisdiction over
17 groundwater only to the extent necessary to prevent interference with decreed water rights.
18 *United States v. Orr Water Ditch Co.*, 600 F.3d 1152 (9th Cir. 2010).

19 The claims made by the United States on behalf of the Walker River Paiute Tribe, for
20 additional water for added lands and storage water for Weber Reservoir, and the claims made
21 by the United States for other federal reservations are disputes over the title to water. In
22 contrast, the claims made against groundwater users would necessarily involve a dispute over
23 the effect of groundwater pumping on established water rights. Combining the issues would
24 result in two actions that must be tried separately as they do not proceed from a common core
25 of facts.

26 **B. Federal Court Jurisdiction Over Groundwater is Limited**

27 It is clear that this Court has jurisdiction over groundwater as administered by
28 the Nevada State Engineer, to the extent that "groundwater allocations that adversely

1 affect the Tribe's [and the United States'] decreed rights to water flows in the river."
 2 *United States v. Orr Water Ditch Co.*, 600 F.3d at 1154. In the appeal concerning *Orr Water*
 3 *Ditch Co.*, the court considered groundwater applications granted by the State Engineer in the
 4 Tracy Segment Hydrological Basin. *Id.* at 1155. The State Engineer found that the previous
 5 estimate of perennial yield was low and that 11,500 acre-feet annually was the proper
 6 perennial yield. *Id.* at 1156. The Pyramid Lake Paiute Tribe asserted that the groundwater
 7 allocations would intercept groundwater that might find its way to the Truckee River and
 8 that any allocation of groundwater would have a presumed effect on decree rights.
 9 *Id.* at 1155–1156.

10 The Ninth Circuit held that the “Decree protects the Tribe from allocations of
 11 groundwater that would adversely affect its decreed water rights under Claims No. 1 or 2.”
 12 *Id.* at 1159. However, after acknowledging that the State of Nevada properly administered
 13 groundwater, the *Orr Ditch Court* limited the holding to the extent necessary to protect
 14 decreed rights:

15 the appeal will be limited, and the practical difficulties will be
 16 manageable. The district court was asked to decide only one
 17 question on appeal: Will the Engineer's allocation of groundwater
 18 rights adversely affect the Tribe's rights under the Decree? If the
 19 court concludes that the allocation will have an adverse effect on
 20 the Tribe's decreed rights, it will instruct the Engineer to reduce the
 amount of allocated groundwater rights by an amount necessary to
 eliminate that effect. If the court concludes that the allocation will
 not adversely affect the Tribe's decreed rights, it will simply affirm
 the Engineer's ruling.

21 *Id.* at 1160. By extension, this Court would need to know the exact nature and extent of the
 22 federal water rights before it could begin to determine whether groundwater pumping
 23 adversely affects the federal rights. Even if the Court were to find an adverse impact,
 24 jurisdiction would be limited to a finding of how much groundwater pumping must be curtailed
 25 to prevent the impact and then, issuing an order to the State Engineer to curb pumping to that
 26 extent.

27 The State Engineer would then be responsible for determining how to implement the
 28 order. *Id.* Citing, *State Eng'r v. Te-Moak Tribe*, 339 F.3d 804, 809 (9th Cir. 2003) (“exercise

of subject matter jurisdiction by the federal courts would be inconsistent with the general principle of water law that a single court should have exclusive jurisdiction over an interrelated system of water rights.”) Thus, decisions concerning who will need to curtail pumping and by how much must be made in the first instance by the State Engineer. NRS 534.110 (7). Groundwater users would then be entitled to appeal under state law. NRS 533.450 (1).

The issues of title to water and impacts from junior users are two separate and distinct cases and controversies and should not be combined in one action under the decree of this Court. The Court’s limited jurisdiction over groundwater should not be abused as requested by the United States and the Tribe to enjoin individual use.

V. CONCLUSION

The Nevada Department of Wildlife moves the Court to dismiss claims for injunctive relief against groundwater users and limit this case to considering the claims to title by the United States and Tribe.

DATED this 31st day of March, 2014.

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CERTIFICATE OF SERVICE

I, Sandra Geyer hereby certify that on this 31st day of March, 2014, I electronically filed the foregoing MOTION TO DISMISS CONCERNING THRESHOLD JURISDICTIONAL ISSUES with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses that are registered for this case; and I further certify that I served a copy of the foregoing to the following non CM/EFC participants by U.S. Mail, postage prepaid, this 31st day of March, 2014:

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